INDEX

	PAGE
Statement	1
Questions Presented	1
Argument	2
I. The general test evolved by this Court for determining the constitutional immunity of an employee of a state instrumentality from federal taxation is well defined	3
II. This Court has already decided in *Ashton* v. *Cameron County Water Improvement District,* 298 U. S. 513, that the supplying of water by a municipal corporation is a governmental function constitutionally immune from interference by the Federal Government	4
III. A long history shows that the supplying of water is a usual and traditional governmental function	10
IV. The facts show that in both ancient and modern urban centers only the government can adequately supply water	16
V. The history, powers and functions of the New York City Department of Water Supply demonstrate that it performs not only usual governmental functions, but functions which only the sovereign can adequately perform	24
1. History	24
2. The powers and function of the New York City Department of Water Supply, Gas & Electricity	31
Conclusion	35

Table of Cases.

	PAGE
Ambrosini v. United States, 187 U. S. 1	9
Ashton v. Cameron County Water Imp. Dist., 298 U. S. 513	2, 3, 4, 5, 6, 7, 8, 9
Baltimore Nat'l Bank v. State Tax Comm., 297 U. S. 209	7
Collector v. Day, 11 Wall. 113	5
Columbus v. Mercantile Trust Company, 218 U. S. 645	20, 21
Flint v. Stone Tracy Co., 220 U. S. 107	3
Helvering v. Powers, 293 U. S. 214	3
Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U. S. 315	7
Indian Motocycle Co. v. United States, 283 U. S. 570	5
Matter of Trustees of Union College, 129 N. Y. 308	9
McCulloch v. Maryland, 4 Wheat. 316	7
McGovern v. City of New York, 229 U. S. 363	33
Metcalf & Eddy v. Mitchell, 269 U. S. 514	1
New Jersey v. New York, 283 U. S. 336	22, 24, 31, 33
New York City v. Pine, 185 U. S. 93	33
New York ex rel. Rogers v. Graves, 299 U. S.	8
N. Y. University v. American Book Co., 197 N. Y. 294	9
People ex rel. City of Amsterdam v. Hess, 157 N. Y. 42	23
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429	9
Remsen v. Wheeler, 105 N. Y. 573	9
United States v. California, 297 U. S. 175	7
United States v. Railroad Co., 17 Wall. 322	5, 9

Constitution of the State of New York.

Art. I, Sec. 6	32
Art. III, Sec. 1	18
Art. VII, Sec. 7	22
Art. VIII, Sec. 10	8

Statutes Cited.

	PAGE
Act of Parliament (33 Henry VIII c. 35)	15
Greater New York Charter:	
Secs. 151-b, 473, 920, 921, 1027	9
208, 226-c, 227	9
255, 453, 468	31
450, 468-532	8, 31
469, 472, 479	32, 33
563	33
National Bankruptcy Act (U. S. Code, title 11, Secs. 301-303)	5
New York Conservation Law, Secs. 533, 540	22
N. Y. Public Health Law, Secs. 70, 71	18
N. Y. Tax Law, Sec. 6, sub. 8	34
N. Y. Transportation Corporation Law, Sec. 81	34
Session Laws of the State of New York:	
Laws of 1741, ch. 719	25
Laws of 1833, ch. 36	29
Laws of 1834, ch. 256	18, 29
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Laws of 1849, ch. 187	34
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Laws of 1884, ch. 292	18
Laws of 1893, ch. 189	18
Laws of 1893, ch. 670	18
Laws of 1901, ch. 466	8
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PAGE

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PAGE

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Supreme Court of the United States

October Term, 1936—No. 451

WILLIAM WHITLOCK BRUSH,
Petitioner,

against

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE CITY OF NEW YORK, IN SUPPORT OF REVERSAL.

Statement.

The issue presented is whether the salary of the Chief Engineer of Water Supply of New York City is constitutionally exempt from the imposition of a federal income tax. It was conceded by the respondent that the petitioner was an employee of the City of New York (R. 20); cf. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514. Thus, only two principal questions are presented. One—the sole question raised by respondent—is whether the supplying of water to the City of New York is a governmental function (R. 20). The other is: does the tax place an unconstitutional burden upon the sovereign taxing and borrowing functions of the State and City of New York?

The Circuit Court of Appeals, affirming the decision of the Board of Tax Appeals, denied the claimed exemption (R. 43-49, 85 F. [2d] 32). This Court granted a writ of certiorari, 299 U. S. (November 16, 1936).

The relevant facts will be detailed in the argument.

Summary of Argument.

I. The general test evolved by this Court for determining the constitutional immunity of an employee of a state instrumentality from federal taxation is well defined.

II. This Court has already decided in *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513, that the supplying of water by a municipal corporation is a governmental function constitutionally immune from interference by the Federal Government.

III. A long history shows that the supplying of water is a usual and traditional governmental function.

IV. The facts show that in both ancient and modern urban centers only the government can adequately supply water.

V. The history, powers and functions of the New York City Department of Water Supply demonstrate that it performs not only usual governmental functions, but functions which only the sovereign can adequately perform.

ARGUMENT.

POINT I.

The general test evolved by this Court for determining the constitutional immunity of an employee of a state instrumentality from federal taxation is well defined.

The general legal doctrine applicable to this case is so clear and well established that it requires only the briefest mention. At one time, this Court held immune from federal taxation only "those operations of the States essential to the execution of its governmental functions and which the State can only do itself". *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172. This Court has abandoned this "essential" governmental test. *Helvering* v. *Powers*, 293 U. S. 214. The present test of immunity of a State instrumentality from federal taxation is whether it is engaged in a "usual governmental function". *Helvering* v. *Powers*, *supra*, pp. 224, 225.

What is or is not a "usual governmental function" is primarily a question of fact—a question to be determined by history, by tradition and by what governments generally and actually do. In the main, this brief will show that governments have owned and operated, and do now usually own and operate, their water supply systems. It will also attempt to indicate some of the facts and reasons why only the sovereign can adequately supply water in urban centers if it is properly to execute its basic function of preserving the foundation of its sovereignty—the continued existence and proper health of its people. The only case which will be discussed at length is *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513 (*infra*, Point II).

POINT II.

This Court has already decided in *Ashton v. Cameron County Water Improvement District,* 298 U. S. 513, that the supplying of water by a municipal corporation is a governmental function constitutionally immune from interference by the Federal Government.

According to our reading of the opinions of this Court in the *Ashton* case, all of the members of the Court were agreed that the supplying of water by the Cameron County Water Improvement District was a governmental function immune from interference and taxation by the federal government.

The second amended petition in the *Ashton* case contains the following allegations: (1) the petitioner was created in 1914 as Cameron County Irrigation District Number One; and in 1919 was converted into Cameron County Water Improvement District Number One; (2) the petitioner was created for the purpose of furnishing water for irrigation and *domestic* purposes; (3) under the Constitution and laws of Texas, the petitioner was granted the express and full power to perform the proprietary and/or corporate function of furnishing water for irrigation and domestic uses (Paragraph I of Second Amended Original Petition). These allegations were contested (Paragraph II, Contest to Petition).

In its motion for a new trial in the *Ashton* case, the petitioner alleged that the District Court erred in holding that it was created for the purpose of performing "governmental functions", for the reason that the Courts of Texas, as well as the other Courts in the Nation, had uniformly held that the furnishing of water was a purely

proprietary function (Paragraphs III, IV and V). Similar allegations were made by the petitioner in its Assignments of Error (Paragraph IX).

The opinion of the majority of this Court in the *Ashton* case pointed out that the respondent was organized "to furnish water for irrigation and domestic uses" (298 U. S., at p. 527). The fact is that the Cameron Water District supplies all of the water for domestic purposes to about 14,000 people and charges for the water on an annual, acreage or meter basis (*Municipal Index* [1929] p. 448; Texas Statutes, Title 128, Chapter 2, Articles 7750, 7622, 7776, 7792).

In holding that the bankruptcy act of Congress approved May 24, 1934 (U. S. Code, tit. 11, §§ 301-303, added by 48 Stat. 798) was unconstitutional, Mr. Justice McReynolds pointed out (pp. 527-528) that: (1) the petitioner is "a political subdivision of the State, created for the local exercise of her sovereign powers, and that the right to borrow money is essential to its operations"; (2) under the doctrine of *Collector* v. *Day*, 11 Wall. 113; *Indian Motocycle Co.* v *United States*, 283 U. S. 570; *United States* v. *Railroad Co.*, 17 Wall. 322, and similar cases, Congress, notwithstanding its broad grant of power "to lay and collect taxes" could *not "levy any tax on the bonds issued by the respondent or upon income derived therefrom. So to do would be an unwarranted interference with fiscal matters of the State—essential to her existence";* (3) since the power of the Congress "To establish * * * uniform laws on the subject of Bankruptcies" is of no higher rank or importance than its power "to lay and collect taxes", there is "no reason for saying that one is impliedly limited by the necessity of preserving the independence of the States, while the other is not"; (4) the Court's special concern was "with the existence of the power claimed—not merely the im-

mediate outcome of what has already been attempted" and it therefore considered it of first importance "that due attention be given to the results which might be brought about by the exercise of such a power in the future"; (5) "If obligations of States or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist".

The opinion of the minority of the Court in the *Ashton* case was also based upon the assumption that the Cameron County Water Improvement District was a governmental unit performing sovereign-governmental functions, and immune from federal taxation. The minority reached a different result because it was of the opinion that in the light of the facts, the history of the bankruptcy legislation and the decisions of this Court, a voluntary petition of a municipal corporation, consented to by the State, did not unconstitutionally disturb the balance between the powers of the states and the powers of the Federal government. Thus, Mr. Justice CARDOZO, in writing for the minority of the Court, said (pp. 538, 540):

> "A situation such as this would call very clearly for the exercise by a court of bankruptcy of its distinctive jurisdiction if the debtor were a natural person or a private corporation. Is there anything in the position of a *governmental unit* that exacts a different conclusion?
>
> The question is not here whether the statute would be valid if it made provision for involuntary bankruptcy, dispensing with the consent of the state

and with that of the bankrupt subdivision. For present purposes one may assume that there would be in such conditions a dislocation of that balance between the powers of the states and the powers of the central government which is essential to our federal system. Cf. *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U. S. 315; *United States* v. *California,* 297 U. S. 175. To read into the bankruptcy clause an exception or proviso to the effect that there shall be no disturbance of the federal framework by any bankruptcy proceeding is to do no more than has been done already with reference to the power of taxation by decisions known of all men. *McCulloch* v. *Maryland,* 4 Wheat. 316. The statute now in question does not dislocate the balance. It has been framed with sedulous regard to the structure of the Federal system.

* * * * * * *

Sufficient reasons do not appear for excluding political subdivisions from the bankruptcy jurisdiction if the jurisdiction is so exerted as to maintain the equilibrium between state and national power. Persuasive analogies tell us that consent will preserve a balance threatened with derangement. A state may not tax the instrumentalities of the central government. It may do so, however, if the central government consents. *Baltimore National Bank* v. *State Tax Commission,* 297 U. S. 209. Reciprocally, the central government, consent being given, may lay a tax upon the states. Cf. *United States* v. *California, supra.* * * * *The prevailing opinion tells us in summing up its conclusions that the bankruptcy power and the taxing power are subject to like limitations when the interests of a state are affected by their action.* Let that test be applied, and the Act must be upheld, for jurisdiction is withdrawn if the state does not approve." (Italics ours.)

In the briefs submitted to this Court on the petition for rehearing in the *Ashton* case, one of the main issues again presented was whether the Cameron County Water Improvement District was organized for and performed a governmental function as contrasted with a proprietary function (Point I of both briefs). This Court denied the petition for rehearing, 299 U. S. ; (October 12, 1936).

From the detailed facts set out *post*, Point V, it will be seen that the New York City Water Supply System is more of a governmental unit, and performs more governmental functions, than the Cameron County Water Improvement District. For present purposes, a brief comparison will suffice. The Department of Water Supply, Gas and Electricity is not a separate water district. It is a constituent part of the municipal government of the City of New York (Greater New York Charter [L. 1901, ch. 466, as amended] §§ 450, 468-532). It supplies water for fire protection, sewage disposal, public buildings and baths, public parks and street cleaning (R. 21). Like the Cameron County Water Improvement District, it also supplies water for domestic uses. "The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection". *New York ex rel. Rogers* v. *Graves*, 299 U. S. (January 4, 1937). Bonds of a municipality for its water supply are specifically excluded by the State Constitution from the municipalities' debts for the purposes of determining their debt limits (N. Y. Const., Art. VIII, § 10). The City's existing bonded indebtedness on December 31, 1935, for its water supply system was $375,583,368.10 (Annual

Report for 1935, City of New York, Department of Water Supply, Gas & Electricity, Table 15). The salaries of the employees of the Department of Water Supply, Gas & Electricity, as well as the interest and sinking fund charges on the bonded indebtedness, are paid out of the general tax levy budget (R. 22, 23; Greater New York Charter §§ 208, 226-c, 227). The revenues in this budget result from real property taxes as well as water charges (Greater New York Charter, §§ 920, 921). These revenues are not earmarked for expenditures; they are commingled in the general tax levy budget (Greater New York Charter §§ 151-b, 920, 921). In fact, the salaries of employees of the Department of Water Supply are paid in part from real property taxes and in whole from the general tax levy budget (R. 22, 23; Greater New York Charter §§ 226-c, 920, 921). The water revenues themselves become a lien when due and have sufficient other attributes of sovereignty to have been held to be a tax (Greater New York Charter, § 473; *Remsen* v. *Wheeler,* 105 N. Y. 573; *Matter of Trustees of Union College,* 129 N. Y. 308). Water charges in arrears are included as items in tax sales (Greater New York Charter, §§ 1027 *et seq.*) The obligation to pay for water "is created by the taxing power of the local authorities" *N. Y. University* v. *American Book Co.,* 197 N. Y. 294, 297.

Thus, as in the *Ashton* case, the tax in question here would not only place an unconstitutional burden upon the governmental function of supplying water, but it would also burden the sovereign taxing and borrowing power of the City of New York. Cf. *United States* v. *Railroad Co.,* 17 Wall. 322; *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; *Ambrosini* v. *United States,* 187 U. S. 1.

POINT III.

A long history shows that the supplying of water is a usual and traditional governmental function.

The construction, control and operation of water supply systems by the sovereign are such ancient and well-known facts of history that full repetition seems unnecessary.

One of the earliest aqueducts was the one built by Hezekiah (King of Judah, 720-689 B. C.) to supply Jerusalem with water. Hezekiah changed an overhead to an underground tunnel in anticipation of an attack from the Assyrians (II Kings, XVIII, 17, and XX, 20; II Chronicles, XXXII, 30; and Isaiah, VII, 3).

Although the governmental construction of aqueducts had been carried on in Greece and the older civilizations of Asia for centuries, probably the best known example of the ancient governmental control and supplying of water is that of the Romans. The detailed story of the early Roman water supply system is well told by SEXTUS JULIUS FRONTINUS, *De Aquis Urbis Romae.* See HERSCHEL, *The Two Books on the Water Supply of the City of Rome of Sextus Julius Frontinus, Water Commissioner of the City of Rome, A. D. 97* (2nd Ed. 1913, Longmans, Green & Co.); FRONTINUS, *Stratagems and the Aqueducts of Rome* (1925, Loeb Classical Library).

"Inasmuch", said FRONTINUS, "as Nerva Augustus, an emperor of whom it is difficult to say whether he devotes more love or more diligence to the common weal, has now conferred upon me the duties of water commissioner, (or water works superintendent, *curator aquarum*), duties contributing partly to the convenience, partly to the health, even to the safety of the city, and from olden time exercised by the most distinguished citizens; I therefore consider it

to be the first and most important thing to be done, as has always been one of my fundamental principles in other affairs, to learn thoroughly what it is that I have undertaken." (HERSCHEL, *op. cit.*, p. 3.)

After thus giving the reason for writing his books, FRONTINUS summarized what he was going to write as follows:

> "3. And that I may not by chance omit anything which is necessary for the understanding of the whole subject matter, I will first put down the names of the waters which are brought to the city of Rome; then by what persons, and under what consuls, and in what year since the founding of the city each of them was brought in; then at what places and at what mile-stones their aqueducts commence; how far they were carried in underground channels, how far on masonry substructures, and how far on arches; then the height of each of them, and the size and number of taps, and what uses are dependent upon them; how much each aqueduct brings to each ward without the city, and how much within the city; how many public delivery tanks there are, and how much is delivered from them to the places of public amusement, how much to the ornamental fountains (*munera*)—as the more educated call them—how much to the water basins, how much to the use of the State (in the name of Caesar), how much for private uses by grants from the emperor; what is the law with regard to the construction and maintenance of the aqueducts; what penalties enforce it under the laws, votes of the Senate, and Imperial edicts that have been enacted." (HERSCHEL, *op. cit.*, p. 5.)

From a reading of FRONTINUS, the following of many phases of and reasons for governmental construction, operation and control of the water supply system appear: Until 331 B. C., the Romans used water which they drew

from wells, springs or the Tiber (HERSCHEL, p. 5). But as the City and its needs for water grew the aqueducts were constructed by the government to carry water from afar (HERSCHEL, pp. 5, 7, 9). Detailed laws, ordinances and regulations were enacted to safeguard the water supply from diversion, exhaustion, interference and pollution, to condemn private lands for the water supply, and to provide for the repairs of the aqueducts and the allocation of the water supply to afford a continuous supply (HERSCHEL, p. 65). So, too, because water was a vital natural resource, the sovereign had to stop its diversion and exhaustion by the water-men for profit (HERSCHEL, pp. 13, 61).

FRONTINUS inquired into the law with regard to conducting and maintaining the waters and said:

> "In examining in ancient writings what was said in detail in these matters in the laws that had been enacted, I found some things different with our forefathers. With them all water was held for the public use, and the law was as follows: *No private person shall conduct other water than that which flows from the basins onto the ground.* For these are the words of the law referring to water which overflows from the troughs,—we call it lapsed water;* and even this was not granted for any other use than for bathing establishments and for fulling-mills; and it was subject to a tax, for a consideration had to be paid for it, which was turned into the public treasury. Some water was conceded to the houses of the principal citizens, in case the others made no objection.
>
> "95. To which authorities belong the right to grant water or to sell it is variously given in those laws, for at times I found it was left to the aediles, at other times to the censors; but it seems that as often as there were censors in the government these grants were sought from them; if there were none,

* That is, water the private right to which has become void.

then the aediles had the power referred to. It is plain from this how much more our forefathers cared for the general good than for private luxury, inasmuch as they caused the State to derive profit even from that water which was conducted to private parties.

"96. The maintenance of the several aqueducts, as I found, was let out to contractors, and they were to employ a definite number of workmen on the aqueducts outside the city, and another definite number within the city; in doing this they had to enter in the public records the names of those whom they intended to employ in the service for each ward of the city; and the duty of inspecting their work devolved at times on the aediles and censors, and at times on the quaestors,* as may be seen from the vote of the Senate which was passed in the consulate of C. Licinius and Q. Fabius.

"97. How much care was taken that no one should injure the conduits, and that no one should draw water that had not been granted, may be seen, among other ways, from the fact that the Circus Maximus could not be watered, even on the days of the Circensian Games, except with the permission of the aediles or censors; which regulation, as may be read in the writings of Ateius Capito, was still in force even after the care of the waters had passed, under Augustus, to commissioners; but lands of which it could be proven that they had been irrigated unlawfully from the public supply were confiscated. A tenant, one of whose slaves infringed the law, even without the knowledge of his master, was punished by a fine. By the same laws it is also enacted as follows: *No one shall with malice pollute the waters where they issue publicly. Should any one pollute them, his fine shall be ten thousand sestertii.*† There

* Jordan, i. I. 408. The quaestor Aemilius built the first stone bridge. There is a *denarius* showing it. Cohen, *T.* 1 *Aem.* 3.

† At that time about two hundred and ninety-two dollars of coin.

fore the order was given to the Curule aediles to appoint two men in each district from the number of those who lived in it, or owned property in it, in whose care the public fountains should be placed.

"98. The first permanent water commissioner was M. Agrippa. He, as one might say, was commissioner mainly of works which he himself had called into existence. This was after his aedileship; and before his aedileship had come his consulship. Inasmuch as the amount of water now available warranted it, he determined how much should be allotted to the public structures, how much to the basins, and how much to private parties. He also kept his own private gang of slaves for the maintenance of the aqueducts and delivery tanks and basins. This gang was given to the State as its property by Augustus, who had received it in inheritance from Agrippa." (HERSCHEL, *op. cit.*, pp. 65, 67, 69; italics in original.)

In FRONTINUS' time "As concerns the draft of water by private consumers, there is to be noted: *that no one shall draw water without a writing from Caesar, that is, that no one shall draw water from the public supply without a license, and no one shall draw more than has been granted.* By this means, we propose to make it possible that the quantity of water, concerning whose recovery we have spoken, may be distributed to new fountains and may be used for new grants from the sovereign". (HERSCHEL, *op. cit.*, p. 75, cf. p. 77; italics in original.)

The proportion of public and private use of water for drinking, public fountains and sewage disposal, was substantially the same in early Roman days as it is in New York City today (HERSCHEL, pp. 53, 55, 58, 59, 81; and see R. 21).

Summarizing the effect of the increased governmental care in handling the water supply, FRONTINUS said:

> "The effect of this care * * * will be felt still more in the improved health of the city, as a result of the increase in the number of the tanks, reservoirs, fountains, and water-basins. No little advantage accrues also to private consumers from the increase in number of private grants; and those who with fear drew water unlawfully, draw their supply now free from care, by grant from the sovereign. Not even the waste water is lost; the cleanliness of the city, too, is greatly improved; the air is purer; and the causes of the pestilence, which gave the air of the city so bad a name with the ancients, are now removed" * (HERSCHEL, *op. cit.*, p. 61).

The Roman experience in the construction, control and operation of the water supply system has also been the experience in New York and other large and growing cities (WEGMANN, *Water Supply of the City of New York*, 1658-1895 [1896]; and see Point IV, *post*).

England affords a more modern instance of the governmental construction and control of water supply systems. In England water systems were built, owned and operated by local governmental authorities long before the Federal Constitution was drafted. One of the earliest statutes on the subject was the Act of 1541 which empowered the Mayor and Dean of Gloucester to provide a water supply (33 Henry VIII, c. 35). Southampton, Hull, Bath and Plymouth, for example, had governmentally operated water supply systems in the fifteenth and sixteenth centuries; Rye and Oxford established municipal operation in the seventeenth century;

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* See H. Jordan, in Hermes, 14 (1879), 269. Also, the same in Topogr. i. I, 149, note 45.

and prior to 1835, Alnwick, Berwick, Bristol, Coventry, Penzance and Leeds had municipally operated water systems (S. & B. Webb, *English Local Government. The Manor and the Borough*, pp. 193, 407, 409, 419, 431, 448, 514). The London water supply system, which is municipally operated, is faced with many of the same problems as are present in New York City. Prescott, *Greater London's Water Supply*, The Municipal Journal, Vol. XLIV, No. 2192, pp. 173-174 (London, Feb. 1, 1935). Today, most of the population of England is served by municipal water systems. Michael & Will, *The Law Relating to Gas & Water Undertakings* (7th ed.), vol. ii, p. 1; *A Century of Municipal Progress, 1835-1935*, p. 319.

POINT IV.

The facts show that in both ancient and modern urban centers only the government can adequately supply water.

All of the twenty largest cities in the United States have municipally operated water supply systems. In other words, every city in the United States with a population of over 375,000 has a municipal water supply system. With the exception of Indianapolis and Birmingham, the forty-nine largest cities in the United States have governmentally operated water systems (Financial Statistics of Cities, 1934 Census Bureau, World Almanac, pp. 282 *et seq.;* Water Supply Statistics of American Municipalities [2nd ed., 1929]; Municipal Index [1929] pp. 371-459). The City of Birmingham has an option to buy, and is working on plans to take over the water supply system. The exception of Indianapolis is explainable in large part by the geological

fact that it is virtually the only comparatively large city in the world which obtains practically all of its water from within its own geographical limits (Municipal Index [1929] p. 390). Differently stated, every city in the United States with a population of over 168,000 with the exception of Birmingham and Indianapolis, has a municipally owned water system.

Substantially the same condition prevails abroad to-day, and prevailed in the large ancient cities (BYE & HEWETT, *Applied Economics* [1929] p. 438; *A Century of Municipal Progress, 1835-1935* [London, 1935] p. 319; *Encyclopaedia Britannica* (14th ed.) vol. 17, p. 292, vol. 19, p. 466. Virtually all of the water undertakings in Canada, South Africa, New Zealand, Queensland, Victoria, New South Wales and Australia are governmentally operated. *Water Engineer's Handbook and Directory* (1931) pp. 309-319. "At present virtually every large city in the world is supplied with water by public enterprise. A city must have an abundant supply of water whether this can be made commercially profitable or not. The capital investment is very large and social and sanitary reasons call for the sale of water at low rates. Furthermore, the city is always a large user of water for public purposes, and a 'stand by' service—a surplus over the needs for all other purposes—must be maintained for fire protection. All these considerations have prevailed to make water supply a public business" (*Encyclopaedia of the Social Sciences*, tit. "Water Supply" Vol. XV, pp. 373-374).

Of all the public utilities, water supply is the only one which in both ancient and modern times has generally been governmentally operated. (Cf. Vol. 19, *Encyclopaedia Americana*, pp. 579, 580; MUNRO, *The Government of the United States* [3rd ed., 1932] pp. 721, 722.) There are many

reasons why this is so. Briefly summarized, some of the reasons are as follows:

1. Public Health.

The protection of the public health in large cities dictates the government operation of the water supply system (*Cyclopedia of American Government,* Vol. III, p. 660). "In its relation to public health the city's water supply is manifestly of supreme consequence, and that is the chief reason for taking it directly under public control." (Munro, *op. cit.*, p. 721.) The protection of the water supply in urban centers requires costly processes of purification, careful supervision of the water supply at its sources and throughout its system, and continuous testing to prevent the transmission of communicable diseases. *Cf.* N. Y. Const., Art. III, § 1; L. 1884, ch. 292; L. 1893, ch. 189; L. 1893, ch. 670; N. Y. Public Health Law §§ 70, 71. It is common knowledge that there is often a direct connection between the water supply and the transmission of such diseases as typhoid and cholera. Wells & Huxley, *The Science of Life* (1934), pp. 920-921, 1036-1037; *cf.* Minutes of the Common Council, January 21, 1799, Vol. II, pp. 497-498 (New York City).

Chadwick's *Report on the Sanitary Condition of the Labouring Population of Great Britain* in 1842 initiated a world-wide movement for an adequate water supply and sewerage which achieved substantial results in the decrease of cholera and typhoid fever (*Encyclopaedia of the Social Sciences,* Public Health, pp. 647 *et seq.*). The first of the laws (Chap. 256, Laws 1834) which enabled the City of New York to go outside of its boundaries and into the territories of other political subdivisions for the purpose

of securing water was a direct result of the frightful ravages of cholera in the summer of 1832 and the failure of the Manhattan Company which had been chartered in 1799 for supplying the City of New York with pure and wholesome water (WEGMANN, *Water Supply of City of New York,* pp. 19, 21).

For a long time, the death rate from typhoid was higher in those communities in the United States which had privately owned and operated water systems than it was in communities having municipal water works (THOMPSON, *Public Ownership,* p. 208; *American Water Works Journal,* Vol. 3 [1916] pp. 259, 305), though to-day most privately owned systems have learned enough from the example of municipally operated systems to eliminate any discrepancy (THOMPSON, *op. cit.,* pp. 208-209). What is true, however, is that the typhoid death rate for the country as a whole has dropped tremendously in the last generation (*Encyclopaedia of the Social Sciences,* Vol. XII, p. 649; *Mortality Statistics,* Dept. of Commerce). It was during this period that many of our cities went through stages of rapid growth and shifted from private to municipal water systems (THOMPSON, *op. cit.,* pp. 204-209; *Encyclopaedia of the Social Sciences,* Vol. XV, p. 383). Also, the municipalities recognized the fact that great care was required in keeping the sewage disposal systems from contaminating the water supply, and were willing to make the huge—and non-profitable—expenditures necessary to do this (THOMPSON, *op. cit.,* p. 209; *American Water Works Journal,* Vol. 3 [1916] p. 302). "Accordingly improved methods of * * * providing drinking water and disposing of sewage have been devised, that make the metropolis a more

healthful place than the town ever was, more healthful even than some country districts. And this influence has been radiating out to the tributary towns and to the villages and scattered homesteads." (GRAS, *An Introduction to Economic History* [1922], p. 324).

From the public health standpoint, water cannot be sold at a profit or be adequately handled by private enterprise in large cities. "Water is as essential to the health and comfort of mankind as the air we breathe; and when mankind congregate in masses * * * it is essential to the public health that it be most abundant, not doled out to yield to others 30 per cent interest, but supplied from the public rates and at the net cost" (*Royal Commission on the State of Large Towns,* 1843-1845, Vol. II, Appendix, p. 193; cf. *History of the Origin and Progress of the Water Supply of Manchester,* 1851; WEBB, *Statutory Authorities,* p. 261.)

This Court has recognized the direct relationship of the water supply to the health and safety of the community:

> "No higher police duty rests upon municipal authority than that of furnishing an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life." *Columbus* v. *Mercantile Trust Company,* 218 U. S. 645, 658.

2. PUBLIC SAFETY.

The public safety requires governmental control of the water system. The building of an under-

ground water conduit by Hezekiah was in anticipation of an attack by the Assyrians (*supra,* p. 10). Similarly, New York City's Catskill Aqueduct, which is 120 miles long and has a daily capacity of 500,000,000 gallons, is, for purposes of safety, mainly built underground and has inverted siphons instead of exposed structures to cross rivers and valleys. HALL, *The Catskill Aqueduct* (1918). Pollution or diversion of the water supply system would obviously affect the public safety. The interruption of the flow of water into New York City for one day would cause havoc.

3. FIRE PROTECTION.

The public protection against fire, particularly in large cities, requires the municipal operation and control of the water system. Cf. *Columbus* v. *Mercantile Trust Company,* 218 U. S. 645, 658; Vol. 9, *Encyclopaedia Britannica, "Fire Protection and Extinction",* page 279. A high pressure "stand by" system with adequate hydrants is required for fire-fighting in urban centers. "The water supply is vital, not only for the health and convenience of domestic and business consumers, but also for public purposes, particularly for use in the extinguishment of fires, for the flushing of sewers and the sprinkling of streets. Without an adequate water supply, fire protection is impossible" (Vol. 19, *Encyclopaedia Americana,* p. 580). The Committee of Twenty of the National Board of Fire Underwriters has commented on the inadequacy of private ownership in this respect, and has taken the view that municipally operated water works meet the requirements of fire protection better than private systems (*National Civic Federation Report,* Part I, Vol. I, p. 130 [1907]).

4. Sewage Disposal.

The public necessity for proper and adequate sewage disposal requires governmental operation and control of the water supply system. Without water, the sewerage systems of large cities could not function. Babbitt, *Sewerage and Sewage Treatment* (4th ed., 1932) p. 1 *et seq.*; R. 33, 34. "No general sewerage system is possible until a public water supply under pressure has been developed, and so the very inability of the young communities to dispose of their sewage increases the danger of their primitive water supply and hastens the time when a public supply must be developed". Vol. 19 *Encyclopaedia Americana*, p. 579; cf. Munro, *op. cit.*, p. 720.

5. The Conservation of a Natural Vital Resource.

The public need of conserving water—one of the few natural vital resources—commands the governmental operation and control of the water supply in urban centers. New York Conservation Law, §§ 533, 540; L. 1933, ch. 563; N. Y. Const., Article VII, § 7.

> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *New Jersey* v. *New York*, 283 U. S. 336, 342.

6. The Use of Water for Public Purposes.

The need of water for such public purposes as street cleaning and sprinkling, for schools, hospitals, parks, public baths and swimming pools, cemeteries and public buildings, requires a municipally operated water system (*Encyclopaedia of the Social Sciences*, tit. "Water Supply", Vol. XV, p. 374; Vol. 19, *Encyclopaedia Americana*, pp. 579, 580; Leavitt, *The*

American City [May, 1914], pp. 422-426). It is common knowledge that in urban centers, water has practically displaced the broom for street cleaning purposes.

7. The Public Need of Water for Growing Cities.

The growth of cities demands a public water supply system. "The development of satisfactory water systems for large cities has been accompanied by the supplanting of private by public enterprise" (Vol. XV, *Encyclopaedia of the Social Sciences*, tit. "Water Supply", p. 373). "As cities grow larger and the use of water required for domestic, industrial and public purposes becomes greater than any suitable supply available in the immediate vicinity, it becomes necessary to build acqueducts and pipe lines to distant water sheds, and to spend enormous sums of money to protect the purity of the supply, to bring it to the City and to distribute it to the people for its various uses" (Vol. 19, *Encyclopaedia Americana*, pp. 579, 580, cf. *People ex rel. City of Amsterdam* v. *Hess*, 157 N. Y. 42, 45).* For many reasons, large cities cannot generally get their requisite water supply within their own limits or from underground sources. In London, Paris or New York, for example, it would be impossible to obtain enough pure water by digging wells or by using the rivers located within their limits.

As the population of cities increases, tanks, reservoirs and canals are constructed as they were in Assyria, Babylonia, Egypt and China. The sources of the Tigris and Euphrates and the waters of the

* See cases cited in the Petition for Certiorari herein, pp. 12-13.

rivers themselves were conveyed through a network of canals to water the many cities of Mesopotamia. HAMMURABI's *Code of Laws* (2250 B. C.) provided for the protection of some of such canals. (*Encyclopaedia Americana*, Vol. 29, p. 40.)

As cities grow water supply problems are presented which cannot be adequately solved by private enterprise. Often to obtain an adequate supply of water it is necessary to go outside of the geographical limits of a state. The issues presented to and decided by this Court in *New Jersey* v. *New York, supra,* indicate some of the many water supply problems which only the sovereign states can adequately handle. "Different considerations come in when we are dealing with independent sovereigns having regard to the welfare of the whole population and when the alternative to settlement is war" *New Jersey* v. *New York, supra,* p. 342.

POINT V.

The history, powers and functions of the New York City Department of Water Supply demonstrate that it performs not only usual governmental functions, but functions which only the sovereign can adequately perform.

1. The History.

In 1658, a few years after the city of New Amsterdam (New York) was incorporated, public wells were sunk in the most important streets. These were used to furnish water for extinguishing fires and for domestic use (WEGMANN [1896] "*Water Supply of the City of New York, 1658-1895*" p. 3; Vol. 7, Records of New Amsterdam, p. 190). In 1676, the Burgomasters provided for more public wells. They "ordered that the severall weells bee made in

the places hereafter menconed (for the publique good of the Cytie)" Vol. I, Minutes of the Common Council of the City of New York, page 46.

Additional public wells were sunk from time to time. On September 10, 1686, the Common Council ordered nine more wells to be built. These were built of stone, "one halfe of the charge of them to be borne by the inhabitants of every Streete proportionately and the other halfe by the Citty" (HALL, *The Catskill Aqueduct and the Earlier Water Supplies of New York City,* Printed as Appendix E in the Twenty-Third Annual Report of the American Scenic and Historic Preservation Society [1918], p. 675; cf. WEGMANN, *supra,* p. 3). The supervision and charge of all the public wells of each ward was given to its Alderman and Common Councilman (WEGMANN, *op cit.,* p. 3).

Pumps came into fashion in the first half of the 18th century and rapidly displaced the old well-sweeps (HALL, *op cit.,* p. 675). After the City had bought its first fire engines, about 1740, it became even more necessary to maintain the water supply. In November, 1741, the Assembly enacted a law (ch. 719) entitled "An act for mending and keeping in repair the publick wells and pumps of the City of New York". Provision was made in this law for the appointment of Overseers of Wells and Pumps, the levying of taxes for their maintenance, and for penalties for interfering with the pumps (HALL, *op. cit.,* pp. 675, 676). The Overseers often neglected their duties and the Common Council, on September 16, 1789, "Ordered that whenever the Overseers of the Public Pumps neglect or refuse to do their duty that the Aldn & Asst of the Ward direct the necessary Repairs; lest by the want of water from the public wells and pumps the City may be endangered in case of Fire", HALL, *op. cit.,* p. 677. The expense of these pumps was borne jointly by the city and the neighborhood. HALL, *op. cit.,* p. 676.

With the growth of New York City, the well water became polluted by organic matter and insufficient in quantity. "The water from the wells in the densely populated districts became so bad that it was sickening to strangers * * *. Besides being objectionable in quality the water obtained from wells was found to be insufficient in quantity for the growing wants of the community and the citizens sought, therefore, more ample sources of supply" (WEGMANN, *op. cit.*, pp. 3 and 4).

The earliest proposal to supply New York City from a common public reservoir with water conducted underground through pipes was made to the Common Council in 1774 by Christopher Colles. At first, the novelty of the plan delayed its adoption. Finally, on July 21, 1774, a majority of the Council approved it. At the same time the Council voted to issue "New York Water Works" notes to the amount of £2,600. Subsequent issues brought the amount up to £9,100. These notes were obligations of the City (Minutes of the Common Council of the City of New York, 1675-1776, Vol. 8, pp. 26, 40, 41, 47, 49, 69; HALL, *op. cit.*, pp. 694, 695; WEGMANN, *op. cit.*, p. 4). During 1775, the City went ahead with the construction of the Colles project. The revolutionary war, however, permanently interrupted the construction (HALL, *op. cit.*, pp. 700, 701).

After the war many new proposals for the development of the water supply system were made (HALL, *op. cit.*, pp. 702-715). In 1785 and 1786, Samuel Ogden and Robert Livingston made proposals for the operation of private water supply systems. On April 19, 1786, the day before the date set for opening the proposals, a strong sentiment was shown at the Common Council meeting against letting out the water supply to private enterprise. The aldermen and assistants were requested to find out from their constituents "whether the corporation ought to grant to indi-

viduals the privilege of supplying the city with water or whether the same ought to be undertaken by the corporation and that the moneys necessary for the purpose should be raised by a tax on the citizens'' (HALL, *op. cit.*, pp. 702-704).

No action was taken on these proposals and between 1786 and 1798 many new proposals were made. The most novel at the time was Dr. Joseph Brown's project to go to the Bronx River for water. This was apparently the first suggestion for going off the Island of Manhattan for this purpose. On December 17, 1798, the Committee of the Common Council which was appointed to investigate this suggestion reported in its favor, and (according to HALL, *op. cit.*, pp. 704-706) made three specific recommendations:

> First, that William Weston * * * be requested to examine the river, the grounds for the aqueducts, etc., and report his opinion;
>
> Second, *that in view of the importance of the matter to the comfort and health of the inhabitants, and the fact that private parties would not undertake the enterprise except with the prospect of gain at the expense of the citizens, the water works should be under the control of the corporation as the immediate representative of the citizens in general;*
>
> Third, that the Legislature be requested to pass a law giving the City power to undertake the work and to raise the necessary funds by taxation.

Mr. Weston was consulted and on March 14, 1799, made his report.

Shortly thereafter, on April 2, 1799, the Manhattan Company was incorporated by Aaron Burr and several others. The charter—as is well known—also granted banking powers to the corporation. The original capital of the corporation was $2,000,000. The Manhattan Company pro-

ceeded to execute its charter powers to construct and operate a water-works system. It built reservoirs and laid the first pipe line system of water works in the then small city (HALL, *op. cit.*, p. 717).

The inefficient and unsatisfactory service rendered by the Manhattan Company caused the immediate rise of bitter discontent and agitation for the restoration of the public municipal water system. On August 27, 1804, the Common Council appointed a Committee to investigate the practicability of supplying the City with water and to confer with the Directors of the Manhattan Company as to their terms for ceding to the Corporation the works established by them for supplying the City with water (HALL, *op. cit.*, p. 720). Nothing effective appears to have been done by the Committee.

From 1804 to 1829 there was again constant agitation for an adequate water supply (HALL, *op. cit.*, pp. 720-732). In 1829 the city built a reservoir in the block between Broadway, Fourth Avenue, 13th and 14th Streets, for the distribution of water for fire extinguishing purposes (HALL, *op. cit.*, p. 731). In 1832 a 12-horse-power steam engine was installed at the well to force water through a main pipe to the reservoir (HASWELL'S *Reminiscences*, pp. 264, 285).

This water supply was inadequate and between 1829 and 1836 events moved rapidly toward the City's Croton system. In 1831, the Board of Aldermen adopted a resolution "setting forth that the Manhattan Company * * * has not, * * * complied with the conditions of their charter [and] * * * asking a repeal of said powers * * * and the vesting exclusively of such powers * * * in the corporation of the City of New York". This resolution was vigorously debated but was lost (WEGMANN, *op. cit.*, p. 19).

However, the need and agitation for an adequate water supply did not cease. The frightful ravages of the

cholera—from which the population suffered during the summer of 1832—gave new interest to the subject (WEGMANN, *op. cit.*, p. 21). In the fall of 1832, the Joint Committee of the Common Council on Fire and Water engaged Colonel DeWitt Clinton to report on the subject. In his report, Colonel Clinton condemned the quality of the water supplied by the Manhattan Company and its failure to further prosecute the work of supplying the City with water. Colonel Clinton also pointed to the municipal water works as an example of a properly operated water supply, but warned that it would soon be inadequate (Board of Aldermen, Document No. 61, November 10, 1832, pp. 194, 195).

After much effort, the Common Council had the Legislature of the State pass an act on February 26, 1833, providing for the appointment by the Governor and Senate of five persons as Water Commissioners, whose duty it was "to examine and consider all matters relative to supplying the City of New York with a sufficient supply of pure and wholesome water for the use of its inhabitants, and the amount of money necessary to effect that object" (L. 1833, ch. 36). Pursuant to this act, the Croton water shed was chosen as the source of supply. The first Croton Aqueduct was constructed under the provisions of L. 1834, ch. 256, and supplementary legislation. Its construction by the City was approved by a large majority of the electors (HALL, *op. cit.*, p. 735). The construction was financed by "water stock of the City of New York" (WEGMANN, *op. cit.*, pp. 31, 38, 43). The total cost of the old Croton aqueduct amounted to about $12,000,000 (WEGMANN, pp. 48, 311). It has a capacity of 90,000,000 gallons a day (HALL, *op. cit.*, p. 744).

In February, 1834, the Common Council adopted a resolution accepting the proposal of the Manhattan Company to enter into a negotiation for the sale of the Company's rights to supply water (HALL, *op. cit.*, p. 734). At this time the

Manhattan Company ceased to supply water. With the demise of the Manhattan Company as a water company, the City entered into an uninterrupted course of municipal operation of its water supply. Every other private company which had been chartered by the Legislature to supply New York City with water failed to do so, their charters either having been voluntarily abandoned or having expired by non-user (Board of Aldermen, Document No. 61, November 10, 1832, pp. 197, 198, 210).

Because of the phenomenal growth of New York City, the old Croton water supply of 90,000,000 gallons a day soon proved inadequate. It became necessary not only to built additional reservoirs, but also to tap other sources and to build another aqueduct from the Croton valley. In 1880 and 1885 an additional daily supply of 22,000,000 gallons was tapped from the Bronx and Byram Rivers. The new Croton aqueduct was built from 1885 to 1893. It has a capacity of 300,000,000 gallons a day (HALL, *op. cit.*, p. 744).

This new supply also soon proved inadequate. After the alarming deficiencies in rainfall in 1895 and 1896, agitation was started for an additional water supply. This agitation came to partial fruition in 1905 (cf. L. 1905, ch. 724). Under this chapter, the present Catskill water supply system was constructed. The water for this system is drawn from the Ashokan Reservoir on the Esopus watershed and from the Schoharie Reservoir on the Schoharie watershed, both being in the Catskill Mountain area. The Catskill Aqueduct is about 120 miles long. The Catskill system cost about $225,000,000 (R. 23). It has a capacity of about 600,000,000 gallons per day (General Report of the Catskill Water Supply System, Board of Water Supply of the City of New York [1936], p. 4). The New York City system now supplies about 900,000,000,000 gallons of water per day (Annual Report of Department of Water Supply for 1935,

Table 1). The total construction cost up to December 31, 1935, to the City to construct its water system was $513,278,684.55 (Annual Report, *supra,* Table 15).

The continuing and compelling need for an additional water supply is presently engaging the attention of New York City officials (R. 23-25). The proposed plan encompasses an additional supply of water from the drainage areas tributary to the Rondout Creek and the Delaware River at an estimated cost of more than $225,000,000 (R. 23-25; cf. *New Jersey* v. *New York,* 283 U. S. 336). The Governor of the State of New York in his special message to the Legislature of February 20, 1936, urged that immediate action must be taken to avert the dangers of a water shortage to the City of New York (Vol. 55, N. Y. State Department Reports, p.).

2. The Powers and Functions of the New York City Department of Water Supply, Gas & Electricity.

The Department of Water Supply, Gas and Electricity, like the Police, Fire and Law Departments, is one of the constituent divisions of the government of the City of New York (Greater New York Charter §§ 450-453, 468-532). It sues and is sued in the name of the City of New York. In such litigation, it is represented by the Corporation Counsel, the law officer of the City (Greater New York Charter § 255). The head of the Department of Water Supply, Gas and Electricity is a Commissioner (Charter § 468). He has the power to appoint a chief engineer of the department (Charter § 453). After many years in the Civil Service, the petitioner was appointed as Chief Engineer of Water Supply (R. 20).

The following were some of the petitioner's duties as Chief Engineer: To protect the water supply from pollution; to supervise and direct the purification of the water in order to free it from or to destroy polluting matter that may have entered the water supply; to direct the proper maintenance of the high pressure fire systems and the hydrants for fire extinguishment and other public uses; to determine the amount of water to be drawn from the various sources of supply; to determine how the various parts of the water system should be operated with relationship to the retention of water for future use, the transportation of the water, the amount of water to be delivered through the various conduits, the treatment of the water in transit and within the City limits, the delivery of the water to the various parts of Greater New York, the pumping of the water to the extent required to furnish adequate pressure, and the use of the water, both inside and outside of buildings; to prevent waste of the water supply; to prepare plans for the improvement and extension of the sources of the water supply and its distribution system; and to supervise generally the supplying of water in Greater New York City (R. 21, 22, 26; Greater New York Charter §§ 469, 479).

The Commissioner of Water Supply, Gas and Electricity, with the approval of the Board of Estimate and Apportionment has the power, within and throughout the State of New York, to select and to determine all sources of water supply for the supply of the public water works of the City (Charter § 472). "Any sources of water so selected * * * shall be deemed necessary for the public use of the City of New York and thereupon, with the approval of the board of estimate and apportionment, together with the authority of the board of aldermen expressed by its resolution or ordinance, it shall be lawful

for the City of New York to acquire by condemnation any real estate * * * that may be necessary * * *. It shall be the duty of the corporation counsel to take the necessary legal proceedings, as provided in this act * * *. The City of New York is authorized to acquire by purchase, lease, or otherwise, lands or water in any other state * * * for the purpose of supplying water to the City of New York. Nothing in this section contained shall be deemed in any manner to limit the rights, property rights, power or jurisdiction now possessed by the City of New York in relation to the possession, maintenance, operation or completion of its present water system" (Charter, *supra*, § 472; and see *id.* § 46; *New York City* v. *Pine*, 185 U. S. 93; *McGovern* v. *City of New York*, 229 U. S. 363; *New Jersey* v. *New York*, 283 U. S. 336; N. Y. Const., Art. I, § 6).

The Commissioner of Water Supply is given broad powers to keep the New York City water supply system free from contamination and pollution (Charter § 479; L. 1893, ch. 189 and ch. 670).

The Department of Water Supply does not supply all of the water in the City of New York. There are still a few small private companies supplying water in the Boroughs of Richmond, Queens and Kings. Most of their water is supplied from wells which are fast being exhausted (L. 1933, ch. 563; 55 N. Y. State Dept. Reports, p. , Feb. 20, 1936). In respect of these petitioner exercises regulatory powers (Charter § 472). It should be briefly noted here that the fact that some few private companies supply water in New York City does not make the supplying of water by the City itself any the less governmental. At one time the collection of taxes was handled by private individuals, but the collection of taxes is today an admittedly governmental function (*Encyclopaedia Britannica* [14th ed., 1929] Vol. 19 [Rome] p. 491, Vol. 9 [French Law and

Institutions] p. 771). Fire protection which is today a clearly governmental function is still handled in part by private companies (N. Y. Transportation Corporation Law, Art. 8, § 81; N. Y. Tax Law, § 6-[8]). In fact, it was not until 1865 that the regular fire department of the City of New York was established (L. 1865, ch. 249). Prior to that time volunteer firemen and private companies were the sole agencies for fire protection (Lossing, *History of the City of New York*, vol. 2, pp. 227-229; New York Tax Law § 6, subd. 8). The regular police force of New York City was not established until 1844 and there are still private police in the City (L. 1844, ch. 315; *Encyclopaedia Britannica* [14th ed.], Vol. 18, p. 159; *Leonard's History of the City of New York*, p. 349). The City's free public school system was established in 1842 and there are still many private schools in the City (L. 1842, ch. 150; *Encyclopaedia of Education*, Vol. [illegible], pp. 452, 453). Similarly, the Sewerage Department was not created until 1849 and many sewers built by private owners are still in existence (L. 1849, ch. 187). The collection of taxes, education, fire and police protection and sewage disposal when handled by a municipality, even though also afforded by private enterprise, are clearly governmental functions exempt from taxation by the federal government. By the same token, the supplying of water by a municipality should be held by this Court to be a governmental function immune from federal taxation.

Conclusion.

The order of the Circuit Court of Appeals should be reversed, and the cause remanded to the Board of Tax Appeals for a redetermination of the petitioner's income tax for the year 1931.

Dated, New York, N. Y., January 11, 1937.

Respectfully submitted,

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